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Asbestos related conditions and the idea of damage in the law of delict.

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The Scottish Parliament's Justice Committee recently heard evidence in relation to the Damages (Asbestos-related Conditions)(Scotland) Bill, introduced by the Executive in June this year. The purpose of the Bill is to provide that certain conditions attributable to the ingestion of asbestos fibres - namely pleural plaques, pleural thickening, and asbestosis – will give rise to a right to damages in personal injuries claims, even where such conditions are asymptomatic, have not caused any present adverse effect to health, and are unlikely to cause any such adverse effect in the future. The legislation has been thought necessary to overturn the authority, persuasive if not binding in Scotland, of the decision of the House of Lords in the English appeal *Johnston v NEI International* [2007] UKHL 39, which refused claims for damages by a number of claimants in respect of asymptomatic pleural plaques caused by exposure to asbestos in the workplace, for the increased risk of future asbestos-related disease (such as symptomatic asbestosis or mesothelioma) attributable to such exposure, and for worry and anxiety (and in one case psychiatric illness) resulting from the contemplation of such possible future illnesses. Their Lordships, in rejecting all of the claims, overturned a twenty year old tradition of awarding damages for pleural plaques in England & Wales, a tradition which had also prevailed in Scotland.

Before considering the issue of the proposed Bill in detail, it is worth prefacing that discussion by setting the debate surrounding it within the wider context of recent debates about the nature of recoverable harm in the law of delict (or tort). The decision in *Johnston*, and the response of the Scottish Parliament to it, is part of an ongoing legal and political debate as to when exposing others to the risk of injury ought properly to be recoverable in damages. That question has come before the House of Lords for consideration in a number of actions in recent years. In *Chester v Afshar* [2004] UKHL 41, their Lordships decided that failure by a surgeon to warn a patient of a risk attendant upon a medical procedure gave rise to a cause of action by the patient upon a harmful eventuation of that risk, even though it could not be shown that the failure to warn had been the cause of the ill effect, given that the patient might have chosen to have had the procedure in any event even had they been properly warned. The doctor had to accept all the consequences of a failure of his duty to warn. On the other hand, their Lordships held in *Gregg v Scott* [2005] UKHL 2 that a negligent failure by a general practitioner properly to diagnose a malignant tumour, a failure which resulted in reduced life expectancy in the patient (who was still alive at the time of the claim), did not give rise to claim in damages, as such a claim for loss of life expectancy had to be tied to a presently suffered physical injury, and such an injury had been neither pled nor proven in the case. Finally, in both *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22 and then *Barker v Corus* [2006] UKHL 20, their Lordships had to wrestle with the question of whether exposure of a claimant to a risk of a physical injury created successively by a number of defendants, followed by the occurrence of the relevant injury without a clear causal connection of it to any one of the defendants, should give rise to liability, the decision in *Barker* being that it should, but only for the loss of the chance of avoiding the injury which each defendant had contributed. The thread running through all these decisions is the idea that present bodily harm must be necessary before a claim can be brought: a mere risk of future injury is insufficient.

The Scottish Parliament's Asbestos Damages Bill is part of this ongoing debate about recovery for risk exposure, but, if passed it, will subvert the line adopted in the recent House of Lords' decisions by creating a liability in damages for culpably exposing an individual to a risk of future asbestos-related illness even though he or she is not presently suffering from

any ill effects, at least as 'ill effects' has traditionally been understood. The proposed change to the law is a radical one. A fundamental principle of the common law of damages in Scotland has always been that, before a claim for damages can be brought in delict, the pursuer should have suffered some harm, or loss or injury. These three terms are often used interchangeably by the courts, and, whichever is used, the requirement stated is that the pursuer must be worse off in some way as a result of the commission of the delict. To avoid confusion, it is also worth noting that the term injury (or *injuria*) is also sometimes used in a different sense, to mean an actionable wrong, that is a wrongful act or omission which infringes an interest protected by law. When used in such a sense, the same fundamental principle of the law still applies however: harm or damage (*damnum*) is required before a wrongful infringement of a right (*injuria*) gives rise to a claim for damages.

This fundamental principle of the law of damages makes it crucial to be able to determine when someone has been harmed, when they are worse off as the result of a delict. Although this issue remains somewhat neglected as a topic of comprehensive academic treatment, it seems clear from the case law that, so far as personal injury is concerned (and so leaving aside issues of economic or property damage), one or more of three marks or *indicia* of harm must be present before it can be said that harm has occurred: pain or suffering; physical impairment, illness or disease; or some alteration in external bodily appearance. So, back pain would count as damage; the loss of a limb, paralysis, or the contraction of a degenerative illness, would count as damage; and an alteration in skin pigmentation, even without any pain or other medical consequences, would also constitute damage (the point being that the law gives a value to the physical appearance we present to the world). Any of these three marks of harm alone is sufficient to constitute damage, although there is often a combination of more than one such mark in a particular case. If any of these marks of personal injury are present, then the additional presence of a risk of further harm in the future or the presence of anxiety or depression consequent upon the existing harm or the contemplation of the future possible harm, may add to the totality of the overall harm suffered by the pursuer, but the courts have consistently held that the risk of future harm or the presence of anxiety or depression do not of themselves, absent some existing recognised personal injury to which they may be attached, constitute recoverable harm (a point emphasised in both the *Gregg* and *Johnston* decisions). This evidently makes it crucial to establish whether actual personal injury has been caused in any case, for unless and until it has, no claim for damages may be made. That is precisely the question addressed by the Bill, with specific reference to the asymptomatic asbestos related conditions listed in it.

Pleural plaques and pleural thickening are types of internal cellular changes which can occur when asbestos fibres are inhaled. The pleura is a membrane separating the lungs from the rib cage. When asbestos fibres are inhaled they are able to pass through the lungs and lodge themselves in the pleural membrane. This triggers a reaction by the human body in an attempt to engulf and destroy the fibres lodged in the pleura. Where fibres are not successfully destroyed, a cellular thickening is produced around the fibres. This cellular thickening is called a pleural plaque. Pleural plaques, in the vast majority of cases, cause no pain or other sensation (in *Johnston* the Court of Appeal stated they were symptomatic in less than 1% of cases). They are not harmful in any other way, and do not cause any other condition. They go undetected unless spotted by means of a chest x-ray or CT scan. The lodging of asbestos fibres in the pleura may also occasionally trigger the release of fluid into the chest cavity (a so-called benign pleural effusion), which in turn may lead to more extensive thickening of the pleura, referred to as diffuse pleural thickening. Such pleural thickening is more likely to be symptomatic, often in the form of an unpleasant respiratory sensation or breathlessness upon exertion. The presence of either pleural plaques or pleural thickening, indicating as each does a substantial build up of asbestos in the body, is an indicator of an increased risk of a harmful asbestos related condition, such as symptomatic asbestosis or mesothelioma (a terminal cancer). If such harmful conditions do arise however, they are caused by the presence of the asbestos, and not the pleural plaques. Persons who

discover that they have pleural plaques and thus that they are a greater risk of future illness may naturally become anxious, but such anxiety (if it is based upon a sound medical appreciation of the facts) is properly attributed to the risk caused by the presence of the asbestos, rather than to the presence of the pleural plaques. All of these facts are widely attested to by the medical experts, as related in the speeches of their Lordships in the *Johnston* case and in evidence before the Justice Committee of the Scottish Parliament.

The above description of pleural plaques and pleural thickening causes obvious problems for their characterisation as damage according to Scots (or English) Law. In those cases where symptoms occur, then there is no problem for their being described as damage. One of the marks of damage discussed earlier was pain or suffering. As pleural plaques may very rarely cause breathing difficulties (although this is more commonly so with pleural thickening), then in such cases the symptoms would be actionable under the existing common law, and no legislative change will be necessary to establish such a claim. But asymptomatic pleural plaques (or pleural thickening) are merely internal cellular alterations. They cause no pain or other sensation, they are not injurious to health, and they are not productive of any visible bodily alteration. In other words, as Lord Hoffmann concluded in his speech in *Johnston*, such pleural plaques are not a recognised form of damage because the claimant is no worse off. It is not, note, the case that asymptomatic pleural plaques are not actionable because they are *de minimis* harms, like a small scratch, more fundamentally it is because they are not harmful at all, a point made clearly and forcefully by Lord Scott in his speech. If symptoms develop, then, to be sure, so long as the symptoms are not *de minimis*, the plaques may *become* a type of damage, but they do not do so until one of the marks of damage is present.

A proper and considered appreciation of both the fundamental principles of the concept of damage, and of the physiological nature of asbestos related pleural plaques and pleural thickening (as well as of the asymptomatic asbestosis mentioned in the Bill), leads inevitably to the conclusion that such conditions simply do not constitute harm or loss or injury, call it what you will, according to the established rules of Scots Law. Clauses 1 and 2 of the Bill would reverse that position. Clause 1(1) states that “Asbestos-related pleural plaques are a personal injury which is not negligible.” This is a sweeping statement, which makes no distinction between whether the plaques are symptomatic or asymptomatic. As stated above, symptomatic plaques would already (so long as the symptoms were, as a matter of fact, not *de minimis*) constitute actionable damage. But asymptomatic plaques would not. For that type of plaques, the Bill simply chooses to legislate for the exact opposite effect to that produced by the application of the traditional rule for determining the nature of damage in Scots Law. The reference to ‘non negligible’ harm is likely to have been added by the parliamentary drafter to address the discussion in the *Johnston* case of the issue of when harm becomes more than merely *de minimis*. But this fails to appreciate the point that their Lordships in *Johnston* ultimately rejected the claim for damages not because the plaques were *de minimis* harm, but because they were not harm at all. The drafting of this clause not only misses this crucial point, but, by treating all pleural plaques the same, fails to appreciate that if pleural plaques do increase in extent they may pass from being asymptomatic, to being symptomatic in a very minor (and thus *de minimis*) way, to being ultimately (in rare cases) sufficiently symptomatic to constitute more than merely negligible harm.

A similar effect to clause 1 is produced by clause 2 in relation to pleural thickening and asbestosis, with the addition that clause 2 specifically mentions that those conditions need not cause, or be likely to cause, any “impairment of a person’s physical condition”, thus making more explicit than clause 1 does the intention to establish in law that the class of recognised personal injuries includes asymptomatic versions of these conditions.

Given the puzzling and unorthodox effect which the provisions of the Bill will produce, an effect which will create an isolated statutory example of non-harmful harm in Scots Law, it is important to ask what the Executive imagines it is doing by enacting this Bill. What

precisely is it for? Or, to put the matter in the way in which a public lawyer might express it, what is the ‘mischief’ which the Bill is intended to address? It is difficult to find one other than in the fact that Scottish courts (and English courts too) had been awarding damages for pleural plaques for some years prior to the *Johnston* decision. The effect of *Johnston* was to galvanise a number of groups who represent the interests of those living with asbestos-related conditions to lobby the Scottish Executive to undo their Lordships’ ruling, on the ground that such persons genuinely suffer anxiety at their physical state, and that it would be harsh to undo a tradition of awarding compensation for such anxiety given the cloud of possible future ill health under which they live. The effect which such an emotional appeal might have on some politicians will be appreciated. After all, it is only admittedly negligent employers or their insurers who will suffer by the passage of the Bill, hardly the ‘good guys’ in the public’s eyes, if one may express it in that crude fashion.

In what seems thus to be the weak reasons lying behind this Bill, much has been made of the tradition of compensating for asymptomatic pleural plaques in the Scottish courts prior to *Johnston*. It is true that in two reported cases from the late 1990s damages were awarded in respect of pleural plaques, but neither case is satisfactory in its legal analysis. In the first case, *Gibson v McAndrew Wormald & Co* 1998 SLT 562, an employee sought damages from his employer in respect of negligent exposure to asbestos, his claim for damages relating to the development of pleural plaques, the increased risk of fatal illness which the exposure had caused him, and the anxiety and depression suffered by him in contemplation of the possibility of developing such future illness. The Lord Ordinary, without any discussion of the nature of damage in Scots Law, simply chose to accept the pursuer’s claim that damage had already been caused to his lungs by virtue of the presence of the asymptomatic plaques. As argued earlier, this assertion is inconsistent with the established idea of damage in the law. His Lordship went on to add (at p564A) that the three things for which the pursuer was seeking damages were “all connected, one with the other”. It is hard to see how this could have been the case. The presence of the pleural plaques was in no way related to the risk of his contracting mesothelioma in the future, neither was his anxiety related to the presence of the pleural plaques but rather to the risk of future illness. The connection drawn by the Lord Ordinary between the three heads of damage was specifically rejected by their Lordships in *Johnston*, as noted by both the Scottish judges in the case, Lord Hope (see para 50 of his speech) and Lord Rodger (see para 90 of his speech). Their detailed analysis of the relevant issues is in marked contrast to the terse and unsatisfactory treatment in *Gibson*.

In the second of these reported Scots cases, *Nicol v Scottish Power plc* 1998 SLT 822, the exposure of the pursuer to asbestos also occurred in the workplace. The facts differed slightly, in that the pursuer also suffered from breathlessness, but this was determined by the court to be the result of his anxiety and also from his prolonged smoking, rather than from his pleural plaques. The analysis of the fundamental nature of the plaques is no more satisfactory than in *Gibson*, although in defence of the Lord Ordinary in this action it may be said that the defender had, prior to the reported proof, already admitted liability for the “loss, injury or damage sustained by [the pursuer] in consequence of his exposure to asbestos”. Both parties had thus agreed that the presence of asymptomatic pleural plaques constituted actionable damage, thereby precluding any proper analysis by the court of whether that was correct. This being a proof, we have a record of the quantum of damages awarded in respect of the plaques, the risk of future illness, and the pursuer’s anxiety: a sum of £13,500 was awarded by the court. It is hard to see how such a figure was arrived at, given the absence of any of the traditional marks of damage by which to judge the severity of the pleural plaques in relation to other types of personal injury. Interestingly, the proposed Scottish Bill is silent on how a judicial assessment of the quantum of damages for asymptomatic asbestos related conditions can sensibly be carried out.

In a further case in which pleural plaques are mentioned in the judgment of the Lord Ordinary, *Shuttleton v Duncan Stewart* 1996 SLT 517 (N), albeit that the decision relates

largely to the question of whether a claim for symptomatic asbestosis was time-barred, his Lordship described pleural plaques as “not, in any general or material sense, disabling or even harmful”, a remark which is evidently somewhat less supportive of the view that pleural plaques are properly classified as injurious.

These reported decisions constitute a slender and inadequate tradition for the award of damages for a condition which, according to the proper understanding of the nature of damage, is not a harm. If it is this tradition which the Scottish Executive is keen to reinstate, rather than the detailed, reasoned and principled judgment of the House of Lords in *Johnston*, this would indeed seem to suggest that the Bill is an emotional rather than a rational response to the perceived problem.

Not only will the Bill, if enacted, upset the traditional understanding of damage in delict, it will have a number of other undesirable effects. First, it will create an impetus to establish other conditions lacking any of the traditional marks of damage as actionable injuries, and why not? Why should asbestos alone be deserving of protection when it is productive of asymptomatic and harmless internal cellular change? Inhalation of a variety of substances can be productive of recognised physiological effects, which may or may not be symptomatic depending on the dosage of the substance inhaled: coal dust is productive of coalworkers’ pneumoconiosis, or ‘black lung’ disease as it is sometimes called, silica dust of silicosis, bauxite dust of bauxite fibrosis, beryllium dust of berylliosis, cotton dust of byssinosis, and a mixture of silica and iron of silicosiderosis, among others. Under the existing law, only when quantities of these substances sufficient to produce symptoms of the named conditions are ingested will a claim for damages arise. Those who have inhaled only small quantities of the relevant substance, or larger quantities which have yet to produce any harmful effect, must wait until they suffer any ill effects. But if those inhaling asbestos are to be permitted to bring a claim even though they have not yet, and may never, suffer any harmful effects, why not concede a similar right to those who have been negligently exposed to these other dusts or substances? There is nothing which makes asbestos special, save that it may have a more vociferous lobby pressing for a right to compensation.

The second unhappy effect which the passage of the Bill may create is a channelling of defenders’ funds away from the genuinely injured in favour of those who may be termed the ‘worried well’. Employers’, and even insurers’, pockets are not bottomless. Opening the litigation floodgates to those who have merely been exposed to the risk of injury and are worried at this, but who are not presently suffering any ill effects, will run the risk that some of those suffering from demonstrably serious asbestos related conditions, such as symptomatic asbestosis and mesothelioma, may find themselves competing for scarce funds from impoverished or underinsured employers. This would be a regrettable development, and is a consideration which has led other jurisdictions (some of which I mention below) from prohibiting claims by such ‘worried well’ litigants.

The third regrettable effect of this Bill is that it will give the impression that Scotland is, for flimsy reasons, committing itself to a legislative position which is the exact opposite from that which other jurisdictions, often with a much greater experience of asbestos claims, have chosen to adopt. In the United States, a number of jurisdictions, including Ohio, Texas and Florida (which together accounted for 35% of all US asbestos claims in the period 1998-2000), have enacted legislation specifically excluding asbestos claims by the ‘worried well’. Florida, for instance, passed an Asbestos and Silica Compensation Fairness Act in 2005. The Act begins with a ‘purpose’ provision which states that it is designed to “give priority to the true victims of asbestos and silica, claimants who can demonstrate actual physical impairment caused by exposure” (Fla. Stat. §774.202), a position it ensures in respect of asbestos claims by providing that a person “may not file or maintain a civil action alleging a non-malignant asbestos claim in the absence of a prima facie showing of physical impairment as a result of a medical condition to which exposure to asbestos was a substantial contributing factor”

(§774.204(2)). The Scottish Bill, in making the asymptomatic conditions listed in the Bill actionable in damages, will legislate to achieve the exact opposite effect. It is regrettable that little or no thought appears to have been given to the experience of jurisdictions with such a long history of dealing with asbestos claims before the Scottish Bill was introduced into Parliament. At a time when Scotland is seeking to achieve a greater national profile on the world stage, such an isolated approach to asbestos liability will not only damage the reputation of this jurisdiction, but could act as an incentive to draw in spurious claims to our legal system from outside Scotland.

It may be worth closing by noting that England is also considering the effect of the *Johnston* decision. The Ministry of Justice, rather than rushing in to legislative change, published a Consultation Paper on pleural plaques in July this year. While possible legislative change to undo the effect *Johnston* is one option being considered, the Consultation Paper acknowledges the dangers such change might entail, including one already discussed above, that “[i]nterference with the fundamental principles on which the Law Lords’ decision was based could have wider consequences and could be used as a precedent to argue for compensation in other situations” (see the Consultation Paper, para 38). The English paper sensibly chooses to suggest other possibilities, including a statutory compensation scheme like that recently established by the Compensation Act 2006 in relation to asbestos related mesothelioma, as well as suggesting the importance of identifying ways to “provide support and reassurance” to those with pleural plaques in order “to help allay their concerns”. This suggestion is replete with good sense. After all, on the traditional legal or medical understanding of the idea of damage, such people have nothing wrong with them, and may never have: communicating this, and so reassuring such people, is surely more sensible than fuelling phantom anxieties by granting a right to sue for damages, as the Scottish Bill will do.

The conclusion to be drawn from this discussion is that the passage of the Damages (Asbestos-related Conditions)(Scotland) Bill would be a regrettable development. It would isolate the specified asbestos-related conditions from the rest of the law of personal injuries, turning that which is not harmful into a harm in order to reinstate a recent history of judicial compensation based upon scant if any discussion of whether harm has in fact occurred. It would harm the unity of the concept of damage in our law, and would place Scots Law out on a limb at a time when other jurisdictions are trying to ensure that damages for those affected by asbestos are channelled to those with universally recognised injuries. It would leave those without any harmful symptoms who have ingested one of the substances other than asbestos listed earlier wondering why they should not also receive compensation for their worry at the risk of future illness, when those who have inhaled asbestos fibres are deemed worthy of damages. It would fuel a compensation culture by increasing claims by the worried well, rather than asking, as the law presently does, such persons to wait before raising a claim until the time when, if ever, they suffer some genuine harm. Most of all, it will solidify an impression increasingly given that politicians are in too great a hurry to interfere with a settled and sensible common law which has demonstrated its utility, good sense and justice over a great many years.